



16/N 09/945,318

PATENT

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicant: Wayne I. Knigge et al. Examiner: Robert Madsen  
Serial No.: 09/945,318 Group Art Unit: 1761  
Filed: August 31, 2001 Docket No.: 869.021US1  
Title: VACUUM-SEALED PACKAGE CONTAINING FRANGIBLE MATERIALS  
(AS AMENDED)

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**PRE-APPEAL BRIEF REQUEST FOR REVIEW**

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Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request. This request is being filed with a Notice of Appeal.

Applicant notes with appreciation that the amended claims in the Amendment and Response filed August 19, 2005 have been entered.

The review is requested for the following reasons: There is a clear deficiency in the prima facie case in support of the rejections.

**§103 Rejection of the Claims**

Claims 1, 10, 12, 15, 27-29, 41, 42, 59-61 and 65 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Beer (U.S. 6,213,645 B1) in view of Thompson et al. (U.S. 3,246,990) and Francis and Maglecic et al. (U.S. 5,473,866) and McCrosson (U.S. 1,458,585) and Ylvisaker et al. (U.S. 4,964,259). This rejection is respectfully traversed because the Examiner has not shown all of the essential elements needed for a prima facie rejection.

In particular, there is no suggestion or motivation to combine the cited references. Additionally, there is no reasonable expectation of success. Finally, the cited references do not teach or suggest all the claim elements of each rejected claim.

*There is no Motivation Found of Record to Combine Beer with Thompson ('990) and Francis and Maglecic and McCrosson (1923) and Ylvisaker per MPEP 2142.*

Beer describes a package designed to hold a non-frangible free flowing product under vacuum. All product examples given in Beer are of non-frangible products which are free

flowing and therefore inherently without significant voids therebetween, e.g., coffee (beans or ground), drink mix, ready to eat breakfast cereal, lawn/garden chemicals. When the term “ready to eat breakfast cereal” is taken in context with the like products listed above, it is clear that Beer intends to include only ready to eat breakfast cereals that are “like” the other products listed, namely non-frangible, free flowing and therefore without significant voids therebetween (e.g., granola, grits, etc.). Beer is more than “silent” on whether or not the breakfast cereal is frangible as suggested by the Office Action, there is simply no indication in Beer that Beer is attempting to or desirous of vacuum packaging any type of frangible product, including a “frangible puffed cereal-based material” as recited in claim 1. Therefore, there is no motivation in Beer to look to Thompson to provide frangible products. Such motivation would further require some teaching or suggestion of reducing breakage of the contents within the package, i.e., of solving the problem associated with vacuum packaging of frangible products. As the Examiner further admits, Beer is also silent as to providing a package that reduces breakage of the contents within. Therefore, there is also no indication in Beer that Beer is attempting to or desirous of providing a package comprising a bag which “becomes sufficiently rigid when vacuum-sealed to reduce breakage of an item contained therein,” as recited in claim 1. Therefore, there is simply no motivation in Beer to look to McCrosson (which teaches vacuum packaging of non-frangible cigars, cigarettes, etc.) to provide a vacuum bag having more rigidity. Since the products of Beer further do not exhibit any significant voids, there is also no motivation in Beer to look to McCrosson to provide vacuum-sealing which allows the package “to be filled with approximately 20 to 60% more cereal-based material” as recited in claim 1. If references don’t recognize the problem (being solved by Applicant’s claimed invention) or even acknowledge it exists, they cannot suggest its solution.

Additionally, each of the references teach very different products and such critical differences must be recognized.

Conventional wisdom also goes against making the combination recited in the present invention, as the results are quite surprising.

For further details, see the discussion on pages 11-14 of the Amendment and Response mailed on August 19, 2005 (hereinafter “8/19/05 A&R”).

*There is no Reasonable Expectation of Success*

The cited references are either silent on the features of a frangible product in a vacuum environment as recited in the claims or otherwise teach away from such a combination. For further details, see the discussion on pages 13-15 of the 8/19/05 A&R.

*The Cited References do not Teach or Suggest all the Claim Elements*

None of the references appear to teach “a frangible puffed cereal-based material having a crush resistance or resistance to compression no less than about 7.0 PSIA, wherein the item is held in the interior portion of the bag, the interior portion of the bag having less than about 1 ppm hexanal therein.” Even if Thompson (‘990) is assumed to teach the stated crush resistance, such a product is not present in a bag having less than about 1 ppm hexanal therein, as recited in the claims. Additionally, none of the references teach vacuum-packaging a frangible puffed cereal-based material wherein vacuum-sealing allows the package to be filled with approximately 20 to 60% more cereal-based material as recited in the present claims. Any discussion of increased product content is with respect to non-frangible products, such as the French fries of Maglecić. As such, it appears that the Examiner has not accorded due weight to all recited claim elements. For further details, see the discussion on page 15 of the 8/19/05 A&R.

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Claims 10, 12, 15, 27-29, 41, 42, 59-61 and 65 all depend, directly, or indirectly, from claim 1. For at least the reasons discussed above, Applicant submits the Office Action has not established the *prima facie* obviousness of the present claims.

*The Following Rejections are All Directed to Claims Dependent on Claim 1:*

Claims 4 and 48 were rejected under 35 U.S.C. § 103(a) as being unpatentable over the above references as applied to claims 1, 10, 12, 15, 27-29, 41, 42, 59-61 and 65 above, further in view of Ray (U.S. 2,370,419, 1945) . This rejection is respectfully traversed. See above reasons and the discussion on page 16 of 8/19/05 A&R.

Claims 49 and 50 were rejected under 35 U.S.C. § 103(a) as being unpatentable over the references applied to claims 4 and 48 above, further in view of Ours et al. (U.S. 6,062,467). This

rejection is respectfully traversed. See above reasons and the discussion on p.16 of 8/19/05 A&R.

Claims 5-8, 13 and 14 were rejected under 35 USC § 103(a) as being unpatentable over the references applied to claims 1, 10, 12, 15, 27-29, 41, 42, 59-61 and 65 above, further in view of Witkowski (U.S. 6,594,927 B2). This rejection is respectfully traversed. See above reasons and the discussion on page 17 of 8/19/05 A&R.

Claims 9, 11, 33-35 and 37-38 were rejected under 35 USC § 103(a) as being unpatentable over the references applied to claims 1, 10, 12, 15, 27-29, 41, 42, 59-61 and 65 above, further in view of Galomb (U.S. 6,245,367 B1). This rejection is respectfully traversed. See above reasons and the discussion on pages 17-18 of 8/19/05 A&R.

Claims 16, 17, 21, 22, 43, 45-47 and 51-57 were rejected under 35 U.S.C. § 103(a) as being unpatentable over the references applied to claims 1, 10, 12, 15, 27-29, 41, 42, 59-61 and 65 above, further in view of Thompson et al. (U.S. 2,478,438). This rejection is respectfully traversed. See above reasons and the discussion on page 18 of 8/19/05 A&R.

Claim 24 was rejected under 35 U.S.C. § 103(a) as being unpatentable over the references applied to claims 1, 10, 12, 15, 27-29, 41, 42, 59-61 and 65 above, further in view of Schwab (U.S. 3,426,355). This rejection is respectfully traversed. See above reasons and the discussion on pages 18-19 of 8/19/05 A&R, which should have referenced the Schwab reference.

Claim 32 was rejected under 35 U.S.C. § 103(a) as being unpatentable over the references applied to claims 1, 10, 12, 15, 27-29, 41, 42, 59-61 and 65 above, further in view of Kraft Foods Inc. (WO9812110). This rejection is respectfully traversed. See above reasons and the discussion on pages 18-19 of 8/19/05 A&R, which should have alternatively referenced claim 32.

Claim 39 was rejected under 35 U.S.C. § 103(a) as being unpatentable over the above references as applied to claims 1, 10, 12, 15, 27-29, 41, 42, 59-61 and 65 above, further in view of Hellweg et al. (U.S. 5,523,109). This rejection is respectfully traversed. See above reasons and the discussion on page 19 of 8/19/05 A&R.

Claims 62-64 were rejected under 35 U.S.C. § 103(a) as being unpatentable over the references applied to claims 1, 10, 12, 15, 27-29, 41, 42, 59-61 and 65 above, further in view of Miyake et al. (U.S. 5,942,320). This rejection is respectfully traversed. See above reasons and the

discussion on pages 19-20 of 8/19/05 A&R.

Independent claim 77 was rejected under 35 U.S.C. § 103(a) as being unpatentable over the references applied to claims 1, 10, 12, 15, 27-29, 41, 42, 59-61 and 65 above. This rejection is respectfully traversed because the prima facie obviousness of the claims has not been established. See discussion on pages 20-21 of 8/19/05 A&R.

Dependent claims 78-79 were also rejected under 35 U.S.C. § 103(a) as being unpatentable over the references as applied to claim 77 above, further in view of Hellweg et al. (U.S. 5,523,109). This rejection is respectfully traversed. See discussion on pages 21-22 of 8/19/05 A&R.

#### Conclusion

Applicant respectfully submits that the claims are in condition for allowance and notification to that effect is earnestly requested. The Examiner is invited to telephone Applicant's attorney at (612) 373-6972 to facilitate prosecution of this application.

If necessary, please charge any additional fees or credit overpayment to Deposit Account No. 19-0743.

Respectfully submitted,

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CERTIFICATE UNDER 37 CFR 1.8: The undersigned hereby certifies that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail, in an envelope addressed to: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on this 19 day of October, 2005.

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